Supreme Court, U.S.
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In The Supreme Court of the United States

Elvis David Lewis
PETITIONER

v.

Eric H. Holder, Jr., Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Department of Homeland Security proved by clear and convincing evidence that the Petitioner, an alien, falsely claimed U.S. citizenship, where the only evidence produced was a copy of the Petitioner's Form I-9, Employment Eligibility Verification, where the Petitioner checked a box next to the following printed statement: "I attest, under penalty of perjury, that I am . . . [a] citizen *or* national of the United States" (italics added).

2. Whether the Petitioner failed to exhaust his administrative remedies regarding his charge as an alien removable from the United States for falsely representing himself to be a U.S. citizen where the Petitioner litigated this claim before an immigration judge and the Board of Immigration Appeals.

3. Whether the Petitioner failed to show the requisite prejudice resulting from a procedural due process violation where an immigration judge precluded him from presenting evidence concerning his attempt to adjust his status to that of a legal permanent resident and this denial negatively impacted the results of the proceeding.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding in Court whose judgment is sought to be reviewed.

Petitioner is Elvis David Lewis.

Respondent is Eric H. Holder, Attorney General.

CORPORATE DISCLOSURE STATEMENT

As this case does not involve any business entity, there is no parent corporation or publicly held company that owns 10% or more of a relevant corporation's stock.

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In The Supreme Court of the United States

No. 08-1920

Elvis David Lewis
PETITIONER

v.

Eric H. Holder, Jr., Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Elvis David Lewis, by counsel, respectfully petitions for a writ of certiorari to review the August 18, 2009, order of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the Petitioner's petition for rehearing, dated August 18, 2009, is unreported. (App. A, infra, 1a-2a).

The judgment of the court of appeals denying the Petitioner's petition for review, dated May 6, 2009, is unreported. (App. B, *infra*, 3a-4a). The order of the Board of Immigration Appeals, dated July 23, 2008, is unreported. (App. C, *infra*, 5a-6a). The order of the Board of Immigration Appeals, dated March 22, 2007, is unreported (App. D, *infra*, 7a-10a). The order of the immigration judge, dated September 12, 2005, is unreported. (App. E, *infra*, 11a-18a).

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009.(App. B, *infra*, 3a-4a) . A petition for rehearing was denied on August 18, 2009. (App. A, *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Pursuant to S.C. Rule 14.1(f), the pertinent text of various sections of the Immigration and Nationality Act of 1952, as amended, shall be set out in the appendix to this petition.

STATEMENT OF THE CASE

An alien that falsely claims U.S. citizenship for any purpose or benefit under the Immigration and Nationality Act or any federal or state law is removable. Furthermore, there is no waiver for this ground of removability, so an alien found to have falsely claimed U.S. citizenship is permanently barred from adjusting his status to that of a legal permanent resident. This case considers whether an alien falsely claims U.S. citizenship by checking a box on a form that asserts that he is *either* a U.S. citizen *or* national. A split exists between the circuit courts that have considered the matter.[1]

I. Statutory Background

8 U.S.C. § 1227(a)(3)(D)(i) provides that an alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under the Immigration and Nationality Act or any federal or state law is deportable. This section applies to representations made on or after September 30, 1996, pursuant to section 344(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). 8 U.S.C. § 1227(a)(3)(D)(ii)

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[1] *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007); *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007); and *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004).

provides the only exception to this ground of removability. Under this exception, an alien who falsely claims U.S. citizenship will not be subject to deportation if: (1) his parents were or are U.S. citizens; (2) he permanently resided in the United States prior to attaining the age of 16; and (3) he reasonably believed at the time of making such representations that he was a U.S. citizen.

8 U.S.C. § 1255 permits a nonimmigrant to adjust his status to that of a legal permanent resident if (1) the alien applies for such adjustment; (2) the alien is eligible to receive an immigrant visa (i.e., the alien is the beneficiary of an approved visa petition); (3) the alien is admissible to the United States for permanent residence; and (4) an immigrant visa is immediately available to the alien at the time his application is filed.

8 U.S.C. § 1182 provides numerous grounds for finding an alien inadmissible to the United States. These grounds range from health- to criminal- related reasons for denying an alien admission to the United States. An alien found to be inadmissible may apply for a waiver of his corresponding grounds of inadmissibility.

8 U.S.C. § 1182(h) is an example of one such waiver. Under this section, the Attorney General may, in his discretion, waive certain criminal grounds of an alien's inadmissibility. Two of the various factors that the Attorney General considers

in making this determination are (1) whether the alien has been rehabilitated; and (2) whether the alien's denial of admission would result in extreme hardship to a U.S. citizen spouse or child. It is important to note, however, that a § 1182(h) waiver does not provide relief for an alien found to have falsely claimed U.S. citizenship.

II. Factual Background

Elvis David Lewis is a native and citizen of Grenada who entered the United States in February of 1981 as a nonimmigrant visitor for business. Although only authorized to stay in this country for one month, Mr. Lewis remained beyond that time. In 1999, the legacy Immigration and Naturalization Service ("INS")[2] placed him in removal proceedings. Mr. Lewis was charged with removability, *inter alia*, under 8 U.S.C. § 1227(a)(3)(D) as an alien that falsely represented himself to be a citizen of the United States for seeking and obtaining employment by attesting under penalty of perjury on a Form I-9, Employment Eligibility Verification, dated July 15, 1997, that he was a U.S. citizen or national.

Mr. Lewis conceded all of the charges of removability against him except the claim of false

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[2] On March 1, 2003, the INS became part of the Department of Homeland Security ("DHS") under the Department of Homeland Security Act of 2002, Pub. L. No. 107-296, Title IV, 116 Stat. 2135 (Nov. 25, 2002).

representation as a U. S. citizen, which he neither admitted nor denied. Mr. Lewis sought relief from removal in the form of adjustment of status under 8 U.S.C. § 1255, a waiver of his criminal grounds of inadmissibility under 8 U.S.C. § 1182(h), and–in the alternative–voluntary departure under 8 U.S.C. § 1229c(b). The basis of Mr. Lewis's original claim for adjustment of status was that he was the beneficiary of an approved visa petition filed by his U.S. citizen daughter.

On June 25, 2002, the immigration judge ("IJ") found Mr. Lewis removable as charged as an alien that had falsely represented himself to be a U.S. citizen. Finding that his U.S. citizen daughter would not suffer extreme hardship if he were removed from the United States, the IJ denied Mr. Lewis's application for a 8 U.S.C. § 1182(h) waiver of his criminal grounds of inadmissibility. Consequently, the IJ found Mr. Lewis inadmissible and therefore statutorily ineligible to adjust his status. Finally, the IJ found Mr. Lewis statutorily ineligible for voluntary departure and ordered him removed to Grenada.

In July of 2002, Mr. Lewis filed a motion to reconsider, which the IJ granted on August 13, 2002. On July 25, 2002, Mr. Lewis also filed a Notice of Appeal with the Board of Immigration Appeals ("BIA"). Later, on August 23, 2002, Mr. Lewis filed a motion to withdraw the appeal. Noting that Mr. Lewis had withdrawn his appeal, the BIA returned the record to the immigration

court.

On March 24, 2003, the IJ administratively closed Mr. Lewis's proceedings because he had married a U.S. citizen, had an approved visa petition, and appeared eligible for adjustment of status. In March of 2004, Mr. Lewis filed a motion to recalendar his removal proceedings, asserting his eligibility for adjustment of status as the beneficiary of an approved visa petition filed by his U.S. citizen wife. At a hearing conducted on March 1, 2005, Mr. Lewis, his U.S. citizen wife, and his U.S. citizen child were prepared to present evidence in support of Mr. Lewis's application for a 8 U.S.C. § 1182(h) waiver. Specifically, Mr. Lewis and his family were prepared to testify regarding his rehabilitation as well as the extreme hardship his U.S. citizen family would face if he were ordered removed from the United States. However, the IJ precluded Mr. Lewis and his family from presenting this evidence on the basis that Mr. Lewis falsely claimed U.S. citizenship, and without a waiver for this charge of inadmissibility, presenting evidence in support of his application for a 8 U.S.C. § 1182(h) waiver was meaningless because Mr. Lewis was already statutorily barred from adjusting his status. Accordingly, Mr. Lewis contested the IJ's previous finding that he had falsely claimed U.S. citizenship. In response, the IJ ordered the parties to file briefs discussing the availability of any waivers in Mr. Lewis's case. On March 31, 2005, Mr. Lewis filed a motion in support of his adjustment of status claim. On June

29, 2005, the DHS filed its response opposing Mr. Lewis's request for a waiver.

In a decision rendered on September 12, 2005, the IJ denied Mr. Lewis's applications for relief from removal. Specifically, the IJ found Mr. Lewis statutorily ineligible for adjustment of status because, without a waiver for falsely claiming U.S. citizenship, Mr. Lewis was inadmissible to the United States. The IJ found that, regardless of whether or not his criminal grounds of inadmissibility were waived, Mr. Lewis had falsely claimed to be a U.S. citizen and was therefore barred from adjusting his status. The IJ also found Mr. Lewis to be statutorily ineligible for cancellation of removal because of the false citizenship claim, coupled with his finding that Mr. Lewis was not a person of good moral character. Finally, the IJ denied Mr. Lewis's application for voluntary departure based on his determination that Mr. Lewis was an aggravated felon. Mr. Lewis timely filed an appeal of the IJ's decision, as well as a motion for remand, with the BIA.

In his brief to the BIA, Mr. Lewis argued that he neither admitted nor denied the charge of falsely claiming U.S. citizenship. Furthermore, he implicitly argued that the DHS failed to meet its burden that he was removable for falsely claiming U.S. citizenship by merely submitting a copy of his Form I-9, Employment Eligibility Verification.

On March 22, 2007, the BIA denied Mr.

Lewis's motion for remand and dismissed his appeal. The Board found that Mr. Lewis failed to address the IJ's finding the he was ineligible to seek a waiver of the charge of falsely claiming U.S. citizenship. The BIA went on to say that Mr. Lewis, without obtaining a waiver of this ground of inadmissibility, was ineligible to adjust his status. The BIA thereby concluded that the IJ did not err in precluding the presentation of evidence in support of his application for a 8 U.S.C. § 1182(h) waiver at the 2005 hearings. Mr. Lewis timely filed a petition for review with the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") seeking judicial review of the BIA's decision.

Mr. Lewis later sought reconsideration of the Board's decision, which was denied as number barred on July 23, 2008. Mr. Lewis sought review of this unfavorable decision with the Fourth Circuit, which dismissed his petition for review on May 6, 2009.

In his petition for review, Mr. Lewis asserted that the BIA erred in finding that he never contested this ground of removability on appeal. Mr. Lewis also asserted that his rights to due process were violated when the IJ precluded the presentation of evidence of rehabilitation at the 2005 hearings. On January 29, 2008, the Fourth Circuit dismissed in part and denied in part Mr. Lewis's petition for review. The Fourth Circuit found that Mr. Lewis had not exhausted administrative remedies with respect to the charge

of falsely claiming U.S. citizenship by failing to raise this issue on appeal to the BIA. Accordingly, the Fourth Circuit claimed it lacked jurisdiction to review this "unexhausted" claim pursuant to 8 U.S.C. § 1252(d)(1). Citing *Rusu v. INS*, the Fourth Circuit also found that Mr. Lewis could not succeed with his due process claim because he failed to show the requisite prejudice resulting from the alleged error. *See Rusu v. INS*, 296 F.3d 316, 320-21 (4th Cir. 2002) (court may only find prejudice when the rights of an alien have been transgressed in such a way as is likely to impact the results of the proceedings). Mr. Lewis timely filed a petition for rehearing.

In his petition for rehearing, Mr. Lewis argued that he did in fact exhaust his administrative remedies by challenging the IJ's finding that he had falsely claimed U.S. citizenship to the BIA. In the alternative, Mr. Lewis argued that the Fourth Circuit may still review the BIA's order, despite his failure to exhaust administrative remedies, because Mr. Lewis's interest in retaining prompt access to a federal judicial forum outweighed the countervailing institutional interests favoring exhaustion. Mr. Lewis also specifically noted that a Ninth Circuit case, *U. S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004), established that checking the box on Form I-9 attesting that one is *either* a U.S. citizen *or* national does not prove beyond a reasonable doubt that an alien is falsely claiming U.S. citizenship. Nevertheless, on May 19, 2008, the Fourth Circuit

denied, without any explanation, Mr. Lewis's petition for rehearing.

REASONS FOR GRANTING THE PETITION

In order to document that they are authorized to work in the United States, all employees, citizens and non-citizens, hired after November 6, 1986 must complete a Form I-9, Employment Eligibility Verification. On this form, a person must check a box attesting, under penalty of perjury, that he is one of the following: (1) a citizen *or* national of the United States; (2) a lawful permanent resident; or (3) an alien authorized to work. U.S. immigration law permanently bars an alien from adjusting his status to that of a legal permanent resident if he is found to have falsely claimed U.S. citizenship. U.S. criminal law makes it a federal crime to falsely claim U.S. citizenship. The United States Court of Appeals for the Fourth Circuit has, in effect, found that an alien who checked a box stating that he was *either* a citizen *or* national of the United States has falsely claimed U.S. citizenship and is permanently barred from adjusting his status to that of a legal permanent resident. The United States Court of Appeals for the Ninth Circuit has found, however, that an alien who checked the same box on Form I-9, attesting that he was *either* a citizen *or* national of the United States, cannot be convicted of the federal crime of falsely claiming U.S. citizenship. In the civil context, other circuits of United States courts of appeals have entered decisions that fall

somewhere in between these two extremes.[3] Therefore, this Court should grant this petition for a writ of certiorari because a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter. Furthermore, because the Fourth Circuit has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings with regards to burdens of proof, this Court should exercise its supervisory authority to correct this error and ensure that all persons within the United States are afforded due process of law.

I. The Fourth Circuit Improperly Dismissed The Petitioner's Claim For Lack Of Jurisdiction

The Fourth Circuit erred as a matter of law in determining that it had no jurisdiction to review the Board's decision not to exercise its *sua sponte* authority. The Panel cites *Mosere v. Mukasey*, 552 F.3d 397, 400-01 (4th Cir. 2009) for the proposition that there is no jurisdiction over the BIA's decision not to reopen a case pursuant to its *sua sponte* authority. In *Mosere*, this Court concluded that because this decision is left to the unfettered discretion of the BIA, there is "no law to apply" in reviewing such a decision. In light of this case's

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[3] *See Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007); and *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007).

procedural history and the legal issues raised, there is "law to apply" in the Petitioner's case.

The Court's ruling, and its following of *Mosere* here conflicts with its own recently-published decision. *See Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009). Notwithstanding the bar to jurisdiction over discretionary determinations found in 8 U.S.C. § 1252(a)(2)(B)(and under the Haitian Refugee and Immigrant Fairness Act), this Court has found jurisdiction over questions of law and constitutional claims under 8 U.S.C. § 1252(a)(2)(D). *See Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009). Inasmuch as this Court's holding in the instant case, following *Mosere*, conflicts with this decision, there is an unresolved tension in this Court's precedent decisions. Decisions from other U.S. Courts of Appeal are instructive. In *Tamenut v. Gonzales*, 477 F.3d 580 (8th Cir. 2007), the U.S. Court of Appeals for the Eighth Circuit recognized jurisdiction and imposed an "abuse of discretion" standard in accord with its own precedent on motions to reopen *sua sponte*. If a Court may impose an "abuse of discretion" standard, it does not stand to reason that even a matter left to the discretion of the BIA is unreviewable. The abuse of discretion standard should apply to any discretionary determinations.

Further, even matters left to the discretion of the BIA often contain questions of law or constitutional issues and are reviewable, as this Court recognized in *Midi*. Other Circuit Courts of

Appeal have found jurisdiction along similar lines in the very context of motions to reopen *sua sponte*. Most explicitly, the U.S. Court of Appeals for the First Circuit directly addressed this point, and found jurisdiction. *See Prado v. Reno*, 198 F.3d 286 (1st Cir. 1999). In *Cruz v. Att'y Gen. of the U.S.*, 452 F.3d 240, 249-50 (3d Cir. 2006), the U.S. Court of Appeals for the Third Circuit found that a BIA decision to deny *sua sponte* reopening for a person with a vacated decision could be reviewed where the denial was not discretionary but was rather based on the BIA position, contrary to all previous cases, that a respondent with a vacated conviction had not shown an exceptional situation.

Where questions of law arise, as here, this Court ought to follow its decision in *Midi*, and recognize jurisdiction. As argued previously, the burden is on the government, not the alien, to show whether by clear and convincing evidence that the alien has made a false claim to U.S. citizenship. Although the BIA has yet to issue a definitive precedent ruling on the issue, it has in several past non-precedent decisions placed the burden on the government to prove that the applicant had clearly made a false claim to U.S. citizenship. *See, e.g.*, *Matter of A75-904-456* (BIA March 15, 2005).[4] The

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[4]The Board's June 19, 2009, decision in *Matter of Olga Barcenas-Barerra*, 25 I&N Dec. Dec. 40 (BIA 2009) is unclear on this issue. Due to the draconian impact of the statute rendering those who make a false claim to U.S.

Board's holding in the instant case thus conflicts with its own past decisions. The Board never substantively reviewed whether DHS met its burden to prove by "clear and convincing" evidence that the charge of falsely claiming U.S. citizenship at INA § 237(a)(3)(D) was properly met.

The BIA's decision to deny the Petitioner's motion to reconsider is contrary to law and an abuse of discretion. In short, in the instant case there is explicit law to apply, and this Court ought to follow *Midi* and recognize jurisdiction over the issues presented.

II. The Department of Homeland Security Failed to Prove by Clear and Convincing Evidence That Mr. Lewis Was Removable for Falsely Claiming U.S. Citizenship

The Fourth Circuit committed legal reversible error by implicitly finding that the BIA properly upheld the IJ's determination that Mr. Lewis falsely claimed U.S. citizenship. In its May 6, 2009 decision, the Fourth Circuit asserted lacked jurisdiction to review his claim. By claiming it

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citizenship, any ambiguity should be resolved in favor of the foreign national, something commonly known as the "rule of lenity." *See INS v. St. Cyr*, 121 S.Ct. 2271, 2290 (2001); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948).

lacked jurisdiction to review his claim when jurisdiction could have indeed lied, the Fourth Circuit implicitly found that the BIA properly upheld the IJ's determination that Mr. Lewis was removable for falsely claiming U.S. citizenship.

In removal proceedings, the DHS has the burden of establishing by "clear, unequivocal, and convincing evidence" that, in the case of an alien who has been admitted to the United States, the alien is deportable. *Woodby v. INS*, 385 U.S. 276, 286 (1966). No decision shall be valid unless it is based upon reasonable, substantial, and probative evidence.

In *U. S. v. Karaouni*, the Ninth Circuit held that a defendant who checked a box attesting that he was *either* a citizen *or* national of the United States could not be convicted under 18 U.S.C. § 911, a federal statute that makes it a crime only to to make a false claim to U.S. citizenship. *U. S. v. Karaouni*, 379 F 3d 1139 (9th Cir. 2004). The Ninth Circuit reasoned that the use of the disjunctive "or" suggests that terms in a sequence should not be interpreted as synonyms, and therefore the government had not proved beyond a reasonable doubt that the defendant falsely claimed U.S. citizenship. *Karaouni*, 379 F.3d at 1142. Indeed, as the defendant argued, by checking the box next to the printed statement, which the government presumably drafted with care, he merely claimed that he was a citizen *or* national, not that he was a citizen and not that he

was a citizen *and* a national. *Id.* The Ninth Circuit continued by noting that

> "the syntactic distinction is critical because the legal definitions of U.S. national and U.S. citizen are not synonymous. All citizens of the United States are nationals, but some nationals, such as persons born in American Samoa and other U.S. territorial possessions, are not citizens. 8 U.S.C. § 1408; *Perdomo Padilla v. Ashcroft*, 333 F.3d 964, 967-69 (9th Cir. 2003). Indeed, the term 'national of the United States' is defined as including 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States.' 8 U.S.C. § 1101(a)(22). Thus, a claim to be a U.S. national is not a claim to be a citizen, but a claim to be a member of a broader group that includes citizens as well as others." *Id.* at 1142-43.

In the case at bar, Mr. Lewis was admitted to the United States as a nonimmigrant visitor for business at New York, New York in February of 1981. Thus, the DHS had the burden of establishing by clear, unequivocal, and convincing evidence that Mr. Lewis was deportable for falsely claiming U.S. citizenship. Like 18 U.S.C. § 911, a plain reading of 8 U.S.C. § 1227(a)(3)(D) shows beyond any question that the provision only covers

false claims of U.S. citizenship and not false claims of U.S. nationality. Thus, by merely submitting a copy of Mr. Lewis's Form I-9, where he checked the same box as the defendant in *Karaouni*, the DHS failed to *unequivocally* establish that Mr. Lewis is removable under 8 U.S.C. § 1227(a)(3)(D) for falsely claiming U.S. citizenship. Indeed, Mr. Lewis may have claimed to be a national of the United States; a claim of U.S. nationality, although false, is not a violation of the INA. Therefore, the Fourth Circuit sanctioned the BIA's violation of a basic principle of immigration law by allowing the government to prove that an individual committed the charged offense by showing that he committed either that offense or some other act. Because Mr. Lewis merely attested on the Form I-9 that he was either a U.S. citizen or national, and a claim of U.S. nationality, even if false, does not violate 8 U.S.C. § 1227(a)(3)(D), this Court should reverse the Fourth Circuit's implicit determination that Mr. Lewis is removable as charged under 8 U.S.C. § 1227(a)(3)(D).

The Fourth Circuit seems to be saying that a statement from which U.S. citizenship might be inferred is sufficient to support a finding that an alien has represented himself to be a U.S. citizen. The Ninth Circuit clearly states that only a direct representation of U.S. citizenship will suffice. In *Rodriguez v. Mukasey*, the Eighth Circuit noted that

"Form I-9 is poorly designed in that by

> checking one box the person ambiguously represents that he is either a citizen or national. Therefore, the evidence must support a finding that the alien marked the 'citizen or national of the United States' box on a form I-9 *with the purpose of representing himself as a citizen, not a national*." *Rodriguez v. Mukasey*, 519 F.3d 773, 776-78 (8th Cir. 2008) (italics added).

Thus, the Eight Circuit places itself on some middle ground between the Fourth and Ninth Circuits' decisions. Unlike the Fourth Circuit, the Eighth Circuit has determined that checking a box attesting to be *either* a citizen *or* national of the United States is not enough to find an alien removable for falsely claiming U.S. citizenship under 8 U.S.C. § 1227(a)(3)(D). Rather, in order to be found removable by clear and convincing evidence, the DHS must prove that the alien marked the "citizen or national of the United States" box with *the purpose of representing himself as a citizen*. The Eighth Circuit found the alien had represented himself as a U.S. citizen, as opposed to a U.S. national, based on his sworn statements from an interview that "he knew that he was 'making a claim to a government agency that [he] was a citizen of the United States.'" *Rodriguez*, 519 F.3d at 775. In the instant case, Mr. Lewis made no such statement. Indeed, Mr. Lewis neither admitted nor denied his charge of

removability under 8 U.S.C. § 1227(a)(3)(D). Thus, under the Eighth Circuit's standard, the DHS has not proved by clear and convincing evidence that Mr. Lewis is removable for falsely claiming U.S. citizenship because the DHS did not *unequivocally* show that Mr. Lewis marked the corresponding box on his Form I-9 with the purpose of representing himself as a citizen.

The Tenth Circuit lines up somewhere between the Fourth and Eighth Circuits. In *Kechkar v. Gonzales*, the Tenth Circuit upheld the BIA's determination that an alien falsely claimed U.S. citizenship where the alien checked the "citizen or national of the United States" box on Form I-9. *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007). When the alien asserted that there was no evidence indicating that he meant to claim citizenship rather than nationality, the Tenth Circuit responded that it was the alien's burden "to show that he intended to claim status as a national." *Kechkar v. Gonzales*, 500 F.3d at 1085.

In the case at bar, Mr. Lewis neither admitted nor denied the charge of falsely claiming U.S. citizenship. Furthermore, instead of holding a hearing on whether Mr. Lewis was removable under 8 U.S.C. § 1227(a)(3)(D), the IJ skipped straight to Mr. Lewis's applications for relief from removal and his waivers of inadmissibility. Thus, the IJ denied Mr. Lewis his right to procedural due process by denying him an opportunity to be heard

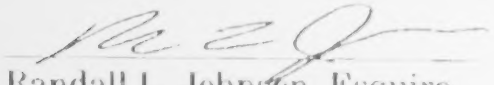
with regard to this charge. Because Mr. Lewis was never provided an opportunity to show that he intended to claim status as a national, the Tenth Circuit's holding in *Kechkar* in inapposite here.

Finally, the Fifth Circuit's decision in *Theodros v. Gonzales* is worth mentioning because, in a footnote, it attempted to distinguish the Ninth Circuit's holding in *Karaouni* by noting the statutory language of 18 U.S.C. § 911 requires a "willful" misrepresentation of U.S. citizenship. *Theodros v. Gonzales*, 490 F.3d 396, 402 n. 7 (5th Cir. 2007). However, as the alien in *Theodros* admitted under oath at a hearing that "he had falsely claimed citizenship in order to obtain employment before securing a work permit," the facts of *Theodros* are distinguishable from the case at bar. *Theodros*, 490 F.3d at 400. Therefore, as Mr. Lewis never claimed under oath that he had falsely claimed U.S. citizenship for the purpose of obtaining private employment, this Court should reverse the Fourth Circuit's decision finding him removable under 8 U.S.C. § 1227(a)(3)(D).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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November 16, 2009

APPENDIX

APPENDIX A

FILED: August 18, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1920

(A76-594-192)

ELVIS DAVID LEWIS,

Petitioner

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Duncan and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

FILED: May 6, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1920

(A76-594-192)

ELVIS DAVID LEWIS,

Petitioner

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent

JUDGMENT

In accordance with the decision of this Court, the petition for review is dismissed.

This judgment shall take effect upon issuance of

this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk

PER CURIAM:

Elvis David Lewis, a native and citizen of Grenada, seeks review of an order of the Board of Immigration Appeals (Board) declining to exercise its sua sponte authority to grant Lewis's third motion to reconsider. We do not have jurisdiction to review the Board's decision not to invoke its sua sponte authority to grant relief. See Mosere v. Mukasey, 552 F.3d 397, 400-01 (4th Cir. 2009). We accordingly dismiss the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DISMISSED

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 594 192 - Arlington Date: JUL 23 2008

In re: ELVIS DAVID LEWIS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

APPLICATION: Reconsideration

This matter was last before the Board on January 29, 2008, when we denied the respondent's second motion for reconsideration. The respondent has filed a third motion for reconsideration. The motion will be denied.

A party may not seek reconsideration of a decision denying a previous motion to reconsider. 8 C.F.R § 1003.2(b)(2). To the extent the respondent seeks *sua sponte* reconsideration, we find no basis upon which to exercise our *sua sponte* authority. The Board correctly states in its March 22, 2007, decision that the respondent

failed to contest on appeal the finding that he is removable under section 237(a)(3(D) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(3)(D). The respondent did not raise his challenge to removability in either his Notice of Appeal or his appellate brief. Moreover, the finding of removability under section 237(a)(3)(D) of the Act is supported by *two* pieces of evidence, namely the Form I-9 and the copy of the respondent's passport falsely listing the United States as his place of birth. For these reasons, we find no error in our dismissal of his appeal and no basis to *sua sponte* reconsider our decision. Accordingly, the motion for reconsideration will be denied.

ORDER: The motion for reconsideration is denied.

/s/ David B. Holmes

FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 594 192 - Arlington Date: MAR 22 2007

In re: ELVIS DAVID LEWIS

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

CHARGE:

Notice:

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(iii), I&N Act [8 U.S.C. §

1227(a)(2)(iii)] - Convicted of an aggravated felon.

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of a controlled substance violation

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, child abuse, neglect, or abandonment

Lodged:

Sec. 237(a)(3)(D), I&N Act [8 U.S.C. § 1227(a)(3)(D)] - False claim of United States citizenship

APPLICATION:

Adjustment of status; waiver of inadmissibility under section 212(h); cancellation of removal under section 240A(b), voluntary departure; remand

ORDER:

PER CURIAM. The appeal is dismissed and the motion to remand is denied. The respondent has appealed from the September 12, 2005, decision of the Immigration Judge. In a prior decision dated June 25, 2002, the Immigration Judge has found the respondent removable as charged, and had denied his requests for relief from removal. Although the respondent had appealed from the

2002 decision, his appeal was withdrawn. *See* BIA order dated Sept. 10, 2002. The Immigration Judge granted the respondent's motion to reconsider and administratively closed the proceedings by order dated March 24, 2003. The case was recalendared on May 7, 2004, and hearings were held on the respondent's eligibility for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, based on an approved visa petition as the spouse of a United States citizen. In his September 12, 2005, decision, the Immigration Judge ultimately found the respondent statutorily ineligible for a waiver of inadmissibility based on his false claim of United States citizenship, and denied the waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), and the application for adjustment of status. He also denied the requests for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), and for voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c.

On appeal the respondent contests the Immigration Judge's denial of the requested relief except for cancellation of removal. He argues that he is eligible for a waiver of inadmissibility under section 212(h) of the Act due to the passage of time since his convictions and in light of the extreme hardship to his United States citizen wife and family if he is removed from the United States. The respondent, however, fails to address the Immigration Judge's finding that he is ineligible to seek a waiver of the charge of false claim of United States citizenship. The respondent has never contested on appeal the Immigration Judge's finding that he is removable as charged under section 237(a)(3)(D) of the Act, 8 U.S.C. § 1227(a)(3)(D). Even if he were deserving of the section 212(h) waiver to absolve certain charges of removability, the respondent

would still be unable to waive the charge of false claim of United States citizenship. *See* Sept. 12, 2005, I.J. at 3; June 25, 2002, I.J. at 7. The respondent, without the waivers, is ineligible to adjust his status. We, therefore, do not find that the Immigration Judge erred in precluding the presentation of evidence of rehabilitation at the 2005 hearings. Moreover, the respondent conceded the charge of removability as being convicted of an aggravated felony and is statutorily ineligible for voluntary departure. *See* June 25, 2002, I.J. at 2; Sept. 12, 2005, I.J. at 3-4. Thus, there is no need to remand the record to the Immigration Judge for further proceedings. Accordingly, the appeal is dismissed and the motion to remand is denied.

/s/ Roger Pauley
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:	)	**IN REMOVAL**
	)	**PROCEEDINGS**
	)	
LEWIS, Elvis David	)	**File No.:** A#76-594-192
	)	
Respondent	)	
	)	

CHARGES: Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act (INA or Act), as amended, as an alien who at any time after admission, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Section 237(a)(2)(A)(iii) of the Act, as amended, as an alien who at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act.

Section 237(a)(2)(B)(i) of the Act, as amended, as an alien who at any time after

admission, has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

Section 237(a)(2)(E)(i) of the Act, as amended, as an alien who at any time after entry, has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

Section 237(a)(3)(D) of the Act, as amended, as an alien who falsely represented himself to be a citizen of the United States for any purpose or benefit under this Act or any federal or state law.

Section 237(a)(1)(B) of the Act, as amended, as an alien who has remained in the United States for a time longer than permitted.

APPLICATIONS:

Waiver of inadmissibility pursuant to INA Section 212(h) Adjustment of Status, pursuant to INA § 245; Cancellation of .

removal pursuant to240A(b); and Voluntary departure, pursuant to INA § 240(B)(b)

APPEARANCES

ON BEHALF OF RESPONDENT:

Randall L. Johnson, Esq.
Johnson & Associates, P.C.
1916 Wilson Blvd., Ste. 203
Arlington, Virginia 22201

ON BEHALF OF THE DHS:

Assistant Chief Counsel
Department of Homeland Security
901 N. Stuart Street, Suite 1307
Arlington, Virginia 22203

DECISION AND ORDER

Respondent is a male, native and citizen of Grenada. Respondent was admitted to the United States at or near New York, New York, on or about February 1981 as a visitor for business with permission to remain in the United States for one month. Respondent has remained in the United States beyond this authorized period of admission without authorization.

The Department of Homeland Security (DHS)[1] filed

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[1] On March 1, 2003, the INS became part of the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub.L.No. 107-296, Title IV, 116 Stat. 2135 (Nov. 25, 2002), as amended.

a Notice to Appear (NTA) dated October 7, 1999, which was filed with the Immigration Court on October 12, 1999. The DHS filed Additional Charges on Inadmissibility/ Deportability (Form I-261), dated November 4, 1999, with the Court on November 11, 1999. The DHS alleges that Respondent was convicted in the Circuit Court of Anne Arundel County, Maryland, on or about May 23, 1984, for the offense of Conspiracy with the Intent and Purpose to Commit Possession of Marijuana with the Intent to Distribute, in violation of the controlled dangerous substance laws. Respondent was sentenced to three years of imprisonment. The DHS also asserts that Respondent was convicted of Domestic Assault on or about December 8, 1994, and on or about March 7, 1997, in the General District Court of Stafford County, Virginia. The DHS also charges that Respondent was convicted on or about September 15, 1998, in the Circuit Court of Fairfax County, Virginia, of the offense of felonious embezzlement in violation of Section 18.2-111 of the Virginia Code and sentenced to 180 days imprisonment. Additionally, the DHS alleges that Respondent, on or about July 15, 1997, in seeking and obtaining employment, falsely represented himself as a citizen of the United States.

After a hearing concerning Respondent's eligibility for relief, this Court issued a written decision on June 25, 2002. In its Order, this Court found the charges on the NTA sustained and denied all relief. Respondent's false claim to United States citizenship made him ineligible for a 212(h)waiver.

On July 25, 2002, Respondent filed a motion to reconsider with the Court, which was granted. Respondent requested the opportunity to apply for withholding of removal and relief under the Convention Against Torture.

Respondent filed an I-589 Application for Asylum and/or Withholding of Removal with the Court on or about June 9, 2000. The Court took discretionary testimony during proceedings regarding Respondent's asylum claim. However, Respondent is not pursuing this form of relief in these proceedings, and the Court will not adjudicate this issue. Currently, Respondent seeks to adjust his status based on an approved visa petition based on his marriage to his United States citizen [wife]. Respondent's original request to adjust status was based on his United States citizen daughter. As his current request for relief is similar to his original request to adjust status, this Court will again deny all relief.

LEGAL ANALYSIS

A. Adjustment of Status and Section 212(h) Waiver

As relief from removal, Respondent seeks adjustment of status pursuant to INA § 245. To be eligible for adjustment of status, Respondent must demonstrate that he is admissible. In its written decision, this Court sustained the removability charge under INA Section 237(a)(3)(D) as an alien who falsely represented himself to be a United States citizen for any purpose or any benefit under the Act, or any federal or state law. This is also a ground of inadmissibility under INA Section 212(a)(6)(C)(ii)(I). Respondent seeks to waive his inadmissibility under INA Section 212(a)(6)(C)(ii)(I). In fact, the INA provides no waiver at all for this charge of inadmissibility. Respondent is statutorily ineligible to adjust status because he is inadmissible and is not eligible for a section 212(h) waiver.

2. Cancellation of Removal pursuant to INA Section 240A(b)

As relief from removal, Respondent seeks cancellation of removal as a nonpermanent resident alien who is removable. To be statutorily eligible for this form of cancellation of removal, Respondent must demonstrate that: A) he has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the dates of such application; B) has been a person of good moral character for such a period; C) he has not been convicted of an offense under section 212(a)(2), 237(a)(2) or 237(a)(3); and D) he can establish that removal would result in exceptional and extremely unusual hardship to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. INA § 240(A)(b)(1). In addition to satisfying the four statutory eligibility requirements, an applicant for cancellation of removal must demonstrate that he warrants such relief as a matter of discretion. See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998); see also Matter of Buffalino, 11 I&N Dec. 351 (BIA 1995); 8 C.F.R. § 1240.8.

The Court finds that Respondent is ineligible fo cancellation of removal, as he does not meet the statutory requirements. Respondent has not been a person of good moral character. Pursuant to Section 101(f)(8) of the Act, no person shall be regarded as having good moral character if, at any time, he has been convicted of an aggravated felony. This Court sustained the aggravated felony charge against Respondent under 101(a)(43)(B) for his drug conviction. Further, Respondent has been found removable under INA Section 237(a)(3)(D), also making

him ineligible for cancellation of removal. See INA Section 240A(b)(1)(C).

3. Voluntary Departure

A grant of voluntary departure pursuant to INA § 240B(b) is appropriate if (A) the alien has been present in the United States for the year before the NTA was served; (B) the alien has been a person of good moral character for the five years prior to the alien's application for voluntary departure; (C) the alien is not an aggravated felon or a danger to the United States; and (D) the alien has demonstrated by clear and convincing evidence that he has both the means and intent to depart from the United States. See INA § 240B(b)(1).

Respondent is statutorily ineligible for voluntary departure because Respondent is an aggravated felon. Accordingly, after a careful review of the record, the Court enters the following order.

ORDER

It is ordered that: Respondent's application for a waiver of inadmissibility under INA Section 212(h) waiver be **DENIED.**

It is Further Ordered that: Respondent's application for adjustment of status pursuant to INA § 245 be **DENIED.**

It is Further Ordered that: Respondent's application for cancellation of removal, pursuant to INA § 240A(b) be **DENIED.**

It is Further Ordered that: Respondent's application for voluntary departure, pursuant to INA Section 240B(b) be **DENIED.**

It is Further Ordered that: Respondent be **REMOVED** to Grenada pursuant to the charges contained in his Notice to Appear.

9/12/05
Date

/s/ John Milo Bryant
John Milo Bryant
United States Immigration Judge

APPENDIX F

8 U.S.C. § 1182(h):

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)

(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney

General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

APPENDIX G

8 U.S.C. § 1227(a)(3)(D):

> **(D) Falsely claiming citizenship**
>
> (i) In general Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.
>
> (ii) Exception In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

APPENDIX H

8 U.S.C. § 1252(d)(1):

> **(d) Review of final orders**
> A court may review a final order of removal only if —
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right

APPENDIX I

8 U.S.C. § 1255:

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.

(b) Record of lawful admission for permanent residence; reduction of preference visas

Upon the approval of an application for adjustment made under subsection (a) of this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the

application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 1152 and 1153 of this title within the class to which the alien is chargeable for the fiscal year then current.

(c) Aliens crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa

Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) of this section shall not be applicable to

(1) an alien crewman;

(2) subject to subsection (k) of this section, an alien (other than an immediate relative as defined in section 1151 (b) of this title or a special immigrant described in section 1101 (a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States;

(3) any alien admitted in transit without visa under section 1182 (d)(4)(C) of this title;

(4) an alien (other than an immediate relative as defined in section 1151 (b) of this title) who was admitted as a nonimmigrant visitor

without a visa under section 1182 (l) of this title or section 1187 of this title;

(5) an alien who was admitted as a nonimmigrant described in section 1101 (a)(15)(S) of this title,

(6) an alien who is deportable under section 1227 (a)(4)(B) of this title;

(7) any alien who seeks adjustment of status to that of an immigrant under section 1153 (b) of this title and is not in a lawful nonimmigrant status; or

(8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a (h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa.

(d) Alien admitted for permanent residence on conditional basis; fiancee or fiance of citizen

The Attorney General may not adjust, under subsection (a) of this section, the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 1186a of this title. The Attorney General may not adjust, under subsection (a) of this section, the status of a nonimmigrant alien described in section 1101 (a)(15)(K) of this title except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101 (a)(15)(K) of this title.

(c) Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception

(1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a) of this section.

(2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.

(3) Paragraph (1) and section 1154 (g) of this title shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154 (a) of this title or subsection (d) or (p) [2] of section 1184 of this title with respect to the

alien spouse or alien son or daughter. In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

(f) Limitation on adjustment of status

The Attorney General may not adjust, under subsection (a) of this section, the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 1186b of this title.

(g) Special immigrants

In applying this section to a special immigrant described in section 1101 (a)(27)(K) of this title, such an immigrant shall be deemed, for purposes of subsection (a) of this section, to have been paroled into the United States.

(h) Application with respect to special immigrants

In applying this section to a special immigrant described in section 1101 (a)(27)(J) of this title—

(1) such an immigrant shall be deemed, for purposes of subsection (a) of this section, to have been paroled into the United States; and

(2) in determining the alien's admissibility as an immigrant—

(A) paragraphs (4), (5)(A), and (7)(A) of section 1182 (a) of this title shall not apply, and

(B) the Attorney General may waive other paragraphs of section 1182 (a) of this title (other than paragraphs (2)(A), (2)(B), (2)(C) (except for so much of

such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), and (3)(E)) in the case of individual aliens for humanitarian purposes, family unity, or when it is otherwise in the public interest.

The relationship between an alien and the alien's natural parents or prior adoptive parents shall not be considered a factor in making a waiver under paragraph (2)(B). Nothing in this subsection or section 1101 (a)(27)(J) of this title shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status described in such section.

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153 (d) of this title) of—

(i) a petition for

classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(II) an application for a labor certification under section 1182 (a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration

Reform and Control Act of 1986 at any date, who—

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990.

The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)

(A) The portion of each application fee

(not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356 (r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356 (m) of this title.

(j) Adjustment to permanent resident status

(1) If, in the opinion of the Attorney General

(A) a nonimmigrant admitted into the United States under section 1101 (a)(15)(S)(i) of this title has supplied information described in subclause (I)

of such section; and

(B) the provision of such information has substantially contributed to the success of an authorized criminal investigation or the prosecution of an individual described in subclause (III) of that section,

the Attorney General may adjust the status of the alien (and the spouse, married and unmarried sons and daughters, and parents of the alien if admitted under that section) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182 (a)(3)(E) of this title.

(2) If, in the sole discretion of the Attorney General—

(A) a nonimmigrant admitted into the United States under section 1101 (a)(15)(S)(ii) of this title has supplied information described in subclause (I) of such section, and

(B) the provision of such information has substantially contributed to

(i) the prevention or frustration of an act of terrorism against a United States person or United States property, or

(ii) the success of an authorized criminal investigation of, or the prosecution of, an individual

involved in such an act of terrorism, and

(C) the nonimmigrant has received a reward under section 2708 (a) of title 22,

the Attorney General may adjust the status of the alien (and the spouse, married and unmarried sons and daughters, and parents of the alien if admitted under such section) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182 (a)(3)(E) of this title.

(3) Upon the approval of adjustment of status under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of such approval and the Secretary of State shall reduce by one the number of visas authorized to be issued under sections 1151 (d) and 1153 (b)(4) of this title for the fiscal year then current.

(k) Inapplicability of certain provisions for certain employment-based immigrants

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 1153 (b) of this title (or, in the case of an alien who is an immigrant described in section 1101 (a)(27)(C) of this title, under section 1153 (b)(4) of this title) may adjust status pursuant to subsection (a) of this section and notwithstanding subsection (c)(2), (c)(7), and (c)(8) of this section, if—

(1) the alien, on the date of filing an

application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

(l) Adjustment of status for victims of trafficking

(1) If, in the opinion of the Secretary of Homeland Security, or in the case of subparagraph (C)(i), the Attorney General, a nonimmigrant admitted into the United States under section 1101 (a)(15)(T)(i) of this title

(A) has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under section 1101 (a)(15)(T)(i) of this title, or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and that, in the opinion of the Attorney General, the investigation or prosecution is complete, whichever period of time is less, [4]

(B) has, throughout such period, been a

person of good moral character, and

(C)

(i) has, during such period, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or

(ii) the alien would suffer extreme hardship involving unusual and severe harm upon removal from the United States,

the Secretary of Homeland Security, or in the case of subparagraph (C)(i), the Attorney General, may adjust the status of the alien (and any person admitted under section 1101 (a)(15)(T)(ii) of this title as the spouse, parent, sibling, or child of the alien) to that of an alien lawfully admitted for permanent residence.

(2) Paragraph (1) shall not apply to an alien admitted under section 1101 (a)(15)(T) of this title who is inadmissible to the United States by reason of a ground that has not been waived under section 1182 of this title, except that, if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's discretion, may waive the application of

(A) paragraphs (1) and (4) of section 1182 (a) of this title; and

(B) any other provision of such section (excluding paragraphs (3), (10)(C), and (10)(E)),[6] if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 1101 (a)(15)(T)(i)(I) of this title.

(3) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(4)

(A) The total number of aliens whose status may be adjusted under paragraph (1) during any fiscal year may not exceed 5,000.

(B) The numerical limitation of subparagraph (A) shall only apply to principal aliens and not to the spouses, sons, daughters, siblings, or parents of such aliens.

(5) Upon the approval of adjustment of status under paragraph (1), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

(m) Adjustment of status for victims of crimes against women

(1) The Secretary of Homeland Security may

adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 1101 (a)(15)(U) of this title to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182 (a)(3)(E) of this title, unless the Attorney General determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if—

(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section 1101 (a)(15)(U) of this title; and

(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an

official involved in the investigation or prosecution certifies that the absence was otherwise justified.

(3) Upon approval of adjustment of status under paragraph (1) of an alien described in section 1101 (a)(15)(U)(i) of this title the Secretary of Homeland Security may adjust the status of or issue an immigrant visa to a spouse, a child, or, in the case of an alien child, a parent who did not receive a nonimmigrant visa under section 1101 (a)(15)(U)(ii) of this title if the Secretary considers the grant of such status or visa necessary to avoid extreme hardship.

(4) Upon the approval of adjustment of status under paragraph (1) or (3), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

APPENDIX J

18 U.S.C. § 911:

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.

No. 09-913

In the Supreme Court of the United States

ELVIS DAVID LEWIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction to review the decision of the Board of Immigration Appeals not to reconsider petitioner's case *sua sponte*.

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In the Supreme Court of the United States

No. 09-913

ELVIS DAVID LEWIS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) is not published in the *Federal Reporter* but is reprinted in 325 Fed. Appx. 178. The decision of the Board of Immigration Appeals (Pet. App. 5a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009. A petition for rehearing was denied on August 18, 2009 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien present in the

United States may seek adjustment of status to that of a lawful permanent resident. See 8 U.S.C. 1255. The alien must meet several prerequisites to qualify for adjustment, including that the alien be "admissible to the United States for permanent residence." 8 U.S.C. 1255(a)(2). As relevant here, aliens convicted of certain criminal offenses and aliens who have falsely represented themselves as United States citizens are not admissible for permanent residence. See 8 U.S.C. 1182(a)(2) and (6)(C)(ii). The Attorney General has discretion, under certain conditions, to waive the applicability of some of these grounds of inadmissibility, including those based on criminal convictions. 8 U.S.C. 1182(h). However, the Attorney General may not waive inadmissibility based on a false representation of United States citizenship. *Ibid.*

An alien is eligible to seek a waiver of inadmissibility only if he demonstrates that he meets certain statutory requirements. One of those requirements for an alien "who is the spouse [or] parent * * * of a citizen of the United States" is to show that "denial of admission would result in extreme hardship to * * * [his] spouse, * * * son, or daughter." 8 U.S.C. 1182(h)(1)(B). In addition to satisfying the statutory eligibility requirements, an alien seeking a waiver of inadmissibility must show that he warrants such relief as a matter of discretion. See, *e.g.*, *In re Mendez-Moralez*, 21 I. & N. Dec. 296, 299 (B.I.A. 1996) (en banc).

b. An alien may file one motion to reconsider any order of the Board of Immigration Appeals (Board) or the immigration judge (IJ). 8 U.S.C. 1229a(c)(6); 8 C.F.R. 1003.2(b), 1003.23(b). The alien may file only one such motion for any given decision, and it must be filed within 30 days of the date of entry of the deci-

sion of which reconsideration is sought. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2). The motion must "specify the errors of law or fact in the previous order" and "be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2(b)(1). An alien "may not seek reconsideration of a decision denying a previous motion to reconsider." 8 C.F.R. 1003.2(b)(2).

If the alien does not file his motion to reconsider within the 30-day time period, the Board or the IJ still may reconsider his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). Whether to reconsider a decision *sua sponte* is entrusted to the discretion of the Board. 8 C.F.R. 1003.2(a). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of Grenada who entered the United States in February 1981 as a nonimmigrant visitor with authorization to stay for one month. Pet. App. 13a. Petitioner remained in the United States beyond the time permitted. *Ibid.* During his time in the United States, petitioner has been convicted of several crimes, including conspiracy to possess marijuana with the intent to distribute it, domestic assault, and embezzlement. *Id.* at 14a.

The former Immigration and Naturalization Service (INS) charged petitioner with being removable from the United States. Pet. App. 11a-12a; see Administrative

Record (A.R.) 772-773. The INS alleged that petitioner was removable for five different reasons: he overstayed his authorized period of stay, see 8 U.S.C. 1227(a)(1)(B); he had been convicted of a controlled substance violation, see 8 U.S.C. 1227(a)(2)(B)(i); he had been convicted of a crime of domestic violence, see 8 U.S.C. 1227(a)(2)(E)(i); he had been convicted of an aggravated felony, see 8 U.S.C. 1227(a)(2)(A)(iii); and he had been convicted of two or more crimes involving moral turpitude, see 8 U.S.C. 1227(a)(2)(A)(ii). Pet. App. 11a-12a; A.R. 562-563, 772-773.[1] The INS then lodged a sixth basis for removability: that petitioner had falsely represented himself to be a United States citizen in seeking employment, see 8 U.S.C. 1227(a)(3)(D). Pet. App. 12a; A.R. 562-563.

Petitioner appeared before an IJ and conceded the charges of removability against him, except that he neither admitted nor denied the charge that he had falsely claimed to be a United States citizen. A.R. 491, 496.

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[1] The INS previously had ordered petitioner removed pursuant to the INA's expedited removal procedures, see 8 U.S.C. 1228(b), on the ground that petitioner's controlled substance offense qualified as an aggravated felony. Petitioner filed a petition for review of that decision. He "concede[d] that he is an alien and that his [drug] conviction * * * qualifies as an 'aggravated felony' within the meaning of the INA." *Lewis* v. *United States INS*, 194 F.3d 539, 541 (4th Cir. 1999). The court of appeals dismissed the petition for review, holding that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [8 U.S.C.] 1182(a)(2) or 1227(a)(2)(A)(iii)." *Lewis*, 194 F.3d at 541-542. But shortly before the court of appeals issued its decision, the INS commenced the formal removal proceedings that are the subject of this petition, pursuant to 8 U.S.C. 1229a, and subsequently sought petitioner's removal only through those proceedings.

Petitioner sought discretionary relief from removal. In particular, he sought adjustment of status under 8 U.S.C. 1255, based on an approved visa petition filed on his behalf by his United States citizen daughter, along with a waiver of inadmissibility under 8 U.S.C. 1182(h) for his convictions. A.R. 496.

The IJ determined that petitioner was removable on all six grounds alleged. A.R. 490-500. With regard to the charge that petitioner had falsely represented himself as a United States citizen, the IJ found that petitioner "attested under penalty of perjury to being a citizen of the United States" on the Form I-9 he submitted to obtain employment and "submitted to his employer a 'U.S. passport,' expired in 1993, indicating 'U.S.A.' as his place of birth." A.R. 496. The IJ further noted that petitioner "neither addressed this charge in his testimony nor in his applications for relief" from removal. *Ibid.* Based on the cited evidence, the IJ concluded that the INS had established by clear and convincing evidence that petitioner was removable for falsely representing himself to be a United States citizen. *Ibid.*

The IJ observed that a waiver of inadmissibility under 8 U.S.C. 1282(h) "does not waive [petitioner's] inadmissibility for falsely claiming citizenship." A.R. 496 n.2. Nevertheless, the IJ proceeded to consider petitioner's eligibility for a waiver of inadmissibility. A.R. 496-499. The IJ determined that petitioner did not meet the "extreme hardship" requirement for such a waiver and further held that he would deny the waiver in the exercise of his discretion in light of petitioner's numerous criminal convictions and his false claim of United States citizenship. *Ibid.* The IJ therefore concluded that petitioner was ineligible to adjust his status and ordered him removed to Grenada. A.R. 499.

Petitioner appealed this decision to the Board, but then withdrew his appeal. A.R. 471-473, 483-486. The Board issued an order noting that fact and returning the record to the IJ. A.R. 400-401.

3. Petitioner filed a motion to reconsider with the IJ. A.R. 480-481. Petitioner again sought adjustment of status and a waiver of inadmissibility, this time based on his marriage to a United States citizen and his claim of hardship to that spouse. Pet. App. 15a.

The IJ reopened petitioner's case but again found him removable and denied the requested relief from removal. Pet. App. 11a-18a. In response to petitioner's argument that he did not falsely claim United States citizenship, the IJ specifically examined the evidence in the record and concluded that the second piece of evidence—an altered passport—was a Grenadian passport that had been modified "to show [petitioner's] place of birth being the United States of America." A.R. 151. The IJ determined that petitioner had "taken [this] and modified it accordingly so as to masquerade as a United States citizen." A.R. 152. As a result of this finding, the IJ again held that petitioner was statutorily ineligible for a waiver of inadmissibility, and therefore statutorily ineligible for adjustment of status. Pet. App. 15a.

The IJ also rejected the new forms of relief petitioner requested—cancellation of removal under 8 U.S.C. 1229b and voluntary departure under 8 U.S.C. 1229c—explaining that petitioner was ineligible for those forms of relief because of his conviction of an aggravated felony and his false claim of United States citizenship (which precluded a finding of good moral char-

acter). Pet. App. 16a-17a.[2] The IJ therefore again ordered petitioner removed from the United States. *Id.* at 17a.

4. The Board dismissed petitioner's appeal. Pet. App. 7a-10a. The Board observed that, although petitioner argued that he was eligible for a waiver of inadmissibility, he "fail[ed] to address" on appeal the IJ's finding that he was ineligible for a waiver of inadmissibility because of his false claim of United States citizenship. *Id.* at 9a; see A.R. 59-69. The Board further emphasized that petitioner "has never contested on appeal the Immigration Judge's finding that he is removable as charged under * * * 8 U.S.C. 1227(a)(3)(D)," the false-claim-of-citizenship provision. Pet. App. 9a. Accordingly, the Board concluded that petitioner was ineligible for a waiver of inadmissibility and therefore ineligible to adjust his status to that of a lawful permanent resident. *Ibid.* For the same reason, the Board rejected petitioner's second argument, which was that the Board erred in precluding him from presenting evidence of rehabilitation in support of his request for adjustment of status. *Id.* at 10a.

Petitioner filed a petition for review, and the court of appeals dismissed it in part and denied it in part in an unpublished, per curiam decision. *Lewis* v. *Mukasey*, 262 Fed. Appx. 544 (4th Cir.), cert. denied, 129 S. Ct. 310 (2008). As relevant here, the court held that it lacked jurisdiction to review petitioner's claim that he was not removable for falsely claiming United States citizenship. The court explained that petitioner had not exhausted his available administrative remedies because he failed

[2] Petitioner did not appeal the denial of cancellation of removal. See A.R. 59-69. The Board upheld the IJ's denial of voluntary departure, Pet. App. 10a, and petitioner did not pursue it further.

to contest that issue before the Board. *Id.* at 545. The court also rejected petitioner's second argument, which was that the IJ erred in precluding him from presenting evidence of rehabilitation after finding him ineligible for adjustment of status. *Ibid.* The court explained that petitioner "cannot succeed with this due process claim because he fail[ed] to show the requisite prejudice resulting from the alleged error." *Ibid.*

Petitioner filed a petition for rehearing, which was denied. Petitioner then filed a petition for a writ of certiorari, which also was denied. See *Lewis* v. *Mukasey*, 129 S. Ct. 310 (2008) (No. 08-203).

5. Petitioner successively filed three motions to reconsider with the Board.

a. In his first motion, petitioner argued that the Board erred in finding that he waived any challenge to removability based on his false claim of citizenship and that the Board and IJ had incorrectly sustained that charge of removability. A.R. 50-54.

The Board denied the motion to reconsider, explaining that petitioner failed to articulate any legal or factual error in the Board's or IJ's previous determinations that he is removable and ineligible for a waiver of inadmissibility based on his false claim of United States citizenship. A.R. 38. Petitioner did not seek judicial review of that determination.

b. Petitioner's second motion sought reconsideration of the Board's denial of his first motion for reconsideration. A.R. 31-36. Petitioner again contended that he had not waived any challenge to the finding that he was removable for having made a false claim of United States citizenship. A.R. 34.

The Board denied this motion as well, explaining that the motion was numerically barred under 8 C.F.R.

1003.2(b)(2), which allows only one motion to reconsider. A.R. 26. Petitioner did not seek judicial review of that determination either.

c. Petitioner then filed a third motion to reconsider, which is the motion at issue here. Petitioner conceded that he had exceeded the numerical limitations for motions to reconsider, but asked the Board to exercise its *sua sponte* authority to reconsider its denial of his second motion to reconsider. A.R. 7-9. Petitioner again argued that the IJ erred in concluding that he had made a false claim of United States citizenship. A.R. 8-9.

The Board denied petitioner's third reconsideration motion. Pet. App. 5a-6a. The Board noted that, under 8 C.F.R. 1003.2(b)(2), an alien may not seek reconsideration of a previous denial of reconsideration. Pet. App. 5a. The Board also declined to reconsider its previous decision *sua sponte*, "find[ing] no basis upon which to exercise [its] *sua sponte* authority." *Ibid.* The Board explained that petitioner had "failed to contest on appeal the finding that he is removable" on the basis of a false claim of citizenship, observing that petitioner "did not raise his challenge to removability in either his Notice of Appeal or his appellate brief." *Id.* at 5a-6a. In any event, the Board explained, "the finding of removability * * * is supported by *two* pieces of evidence, namely the Form I-9 [petitioner's employment eligibility form] and the copy of [petitioner's] passport falsely listing the United States as his place of birth." *Id.* at 6a. The Board therefore found "no error in [its] dismissal of [petitioner's] appeal and no basis to *sua sponte* reconsider [its] decision." *Ibid.*

6. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam order. Pet. App. 3a-4a. The court explained that it was being

asked to review "an order of the Board * * * declining to exercise its sua sponte authority to grant [petitioner's] third motion to reconsider" and held that it did "not have jurisdiction to review the Board's decision not to invoke its sua sponte authority to grant relief." *Id.* at 4a. The court cited (*ibid.*) *Mosere* v. *Mukasey*, 552 F.3d 397 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009), where it had previously explained that the Board's denial of a motion to reopen based on its *sua sponte* authority is not subject to judicial review because that authority is entrusted to the Board and "there are no meaningful standards by which to judge the [Board's] exercise of its discretion." *Id.* at 400-401.

ARGUMENT

Petitioner contends (Pet. 12-21) that the court of appeals erred in dismissing his claim for lack of jurisdiction and that the agency erred in denying his application for adjustment of status. The court of appeals' decision is correct and does not conflict with a decision of any other court of appeals. Petitioner's other arguments, which relate generally to the merits of his case, are not properly before this Court, because the court of appeals did not rule on them. Further review is therefore unwarranted.

1. At issue in this case is the Board's denial of petitioner's third motion to reopen. Under the governing regulations, an alien is limited to one motion to reconsider any given decision. 8 C.F.R. 1003.2(b)(2). The motion at issue is petitioner's third motion to reconsider. Accordingly, the motion is numerically barred. *Ibid.* Petitioner conceded that point below, but argued that the Board should exercise its *sua sponte* authority to reopen proceedings. A.R. 7-9.

The Board declined to exercise its discretion to reconsider petitioner's case *sua sponte*, Pet. App. 5a-6a, and the court of appeals held that it lacked jurisdiction to review that determination, *id.* at 4a. In support of its conclusion that a denial of *sua sponte* reconsideration opening is unreviewable, the court of appeals cited *Mosere* v. *Mukasey*, 552 F.3d 397, 400-401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009), which held that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board's discretion by law. Pet. App. 4a. Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). As the *Mosere* court explained, that is true with respect to *sua sponte* reopening because "there are no meaningful standards by which to judge the [Board's] exercise of its discretion." 552 F.3d at 401. The *Mosere* court noted that "Section 1003.2(a) * * * 'provides no guidance as to the [Board's] appropriate course of action, sets forth no factors . . . , places no constraints on the [Board's] discretion, and specifies no standards for a court to use to cabin the [Board's] discretion.'" *Ibid.* (quoting *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc)). Furthermore, the regulation permitting the Board to reopen a case *sua sponte* establishes a procedural mechanism for the Board itself in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. Accordingly, the Board's decision whether to reconsider a decision *sua sponte* is committed to agency discretion by law and is not reviewable by a court.

The decision below is consistent with the unanimous view of the courts of appeals that the Board's decision

not to reopen or reconsider a case *sua sponte* is unreviewable. See *Mosere*, 552 F.3d at 400 (collecting cases).[3] Although most cases concerning the Board's *sua sponte* authority have addressed motions to reopen, rather than motions to reconsider, the two are the same for purposes of judicial review, because the relevant regulation commits both decisions to the Board's broad discretion, provides a procedural mechanism for the Board rather than conferring an individually-enforceable right, and provides no judicially manageable standards for reviewing these decisions. See, *e.g.*, *Calle Vujiles* v. *Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003).

Petitioner contends (Pet. 13) that the court of appeals' ruling conflicts with *Tamenut* v. *Gonzales*, 477 F.3d 580 (8th Cir. 2007), but the Eighth Circuit vacated that decision *en banc* and joined the unanimous view of the other courts of appeals. See 521 F.3d at 1004. Petitioner also cites (Pet. 14) decisions of the First and Third Circuits, but those decisions are inapposite. *Prado* v. *Reno*, 198 F.3d 286 (1st Cir. 1999), is directly contrary to petitioner's position. There, the court of appeals held that the alien's claim was "simply not justiciable" because "the decision of the [Board] whether to invoke its sua sponte authority is committed to its unfettered discretion." *Id.* at 292 (citation omitted).

Cruz v. *Attorney General of the United States*, 452 F.3d 240 (3d Cir. 2006), is likewise inapt. In that case, the court of appeals remanded to the Board to answer

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[3] In *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that ten courts of appeals had agreed that denials of *sua sponte* reopening are unreviewable because *sua sponte* reopening is committed to agency discretion by law. *Id.* at 839 n.18.

predicate factual and legal questions that would have an impact on whether judicial review was barred by a particular provision of the INA, 8 U.S.C. 1252(a)(2)(C), or (alternatively) was barred because the decision was committed to agency discretion by law. See 452 F.3d at 249-250. The court of appeals recognized that it generally "lack[s] jurisdiction to review [Board] decisions not to reopen proceedings sua sponte," but determined that a remand was appropriate in that particular case because unresolved factual and legal issues meant that the court was "presented with a jurisdictional conundrum in that we have no way of knowing whether the [Board] declined to exercise its sua sponte authority on a reviewable or non-reviewable basis." *Ibid.* *Cruz* did not create disagreement in the circuits, for the court of appeals accepted the general principle that the Board's decision not to exercise its *sua sponte* authority is unreviewable. Moreover, this is not the exceptional case where the court of appeals is unable to discern the basis for the Board's decision: the Board has repeatedly explained that petitioner waived any challenge to the IJ's finding that he made a false claim of citizenship and that the IJ's factual findings were well-supported in the record. Pet. App. 5a-6a, 9a. The court of appeals has already held that petitioner failed to exhaust his challenge to the false-claim-of-citizenship finding, *Lewis* v. *Mukasey*, 262 Fed. Appx. 544, 545 (4th Cir. 2008), and this Court denied certiorari, see 129 S. Ct. 310 (2008).

2. Petitioner also contends that the court of appeals erred because he raises a question of law or constitutional claim, which would be reviewable under 8 U.S.C. 1252(a)(2)(D). See Pet. 13 (citing *Midi* v. *Holder*, 566 F.3d 132 (4th Cir. 2009)). He is mistaken. Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. 1252(a)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D).

As an initial matter, petitioner did not raise any argument regarding Section 1252(a)(2)(D) in the court of appeals, and the court of appeals did not pass on it. This Court therefore should decline to address that issue in the first instance. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Moreover, petitioner does not allege that there is any disagreement in the circuits regarding the applicability of Section 1252(a)(2)(D) to denials of *sua sponte* reconsideration.

In any event, Section 1252(a)(2)(D) does not apply here. By its plain text, Section 1252(a)(2)(D) provides a rule of construction for certain provisions of the INA that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Denials of *sua sponte* reopening are not made unreviewable due to a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8. Instead, they are unreviewable as committed to agency discretion by law, both because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right, and because there are no judicially manageable standards to evaluate the agency's exercise of its discretion. See pp. 11-12, *supra*. Even assuming that Section 1252(a)(2)(D) applies to matters that are committed to agency discretion

by law, petitioner does not raise any colorable legal issue. The Board determined that petitioner was removable because he made a false claim of citizenship and that petitioner waived any challenge to that determination. Pet. App. 5a-6a, 9a. Those fact based determinations do not raise questions of law. Moreover, although petitioner alleges (Pet. 20-21) a due process violation, his complaint is about the IJ's conduct of his hearing, not of the Board's decision not to reconsider his case *sua sponte*, and, in any event, that claim was already rejected by the court of appeals and certiorari was denied by this Court. See pp. 16-17, *infra*. Accordingly, the court of appeals did not err in finding petitioner's claim unreviewable.

3. Even if the court of appeals did have jurisdiction here, petitioner could not prevail. *Sua sponte* reconsideration is entrusted to the Board's broad discretion. See 8 C.F.R. 1003.2(a). The Board has explained that it only reopens or reconsiders proceedings *sua sponte* in "exceptional situations" and not "as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997). Here, the IJ reviewed the evidence and testimony and made specific findings that petitioner made a false claim of citizenship based on two independent pieces of evidence—an I-9 employment authorization form and a falsified passport. Pet. App. 6a; A.R. 496. On appeal, petitioner entirely "fail[ed] to address" the IJ's finding that he was ineligible for a waiver of inadmissibility because of his false claim of United States citizenship and "never contested" the IJ's finding "that he is removable as charged under * * * 8 U.S.C. § 1227(a)(3)(D)." Pet. App. 9a. The Board reasonably decided to deny petitioner's third sue-

cessive motion to reconsider where the IJ had made specific findings on the issue and petitioner had failed to contest the IJ's determination despite numerous filings and years of proceedings before the agency.

4. Petitioner contends (Pet. 15-21) that the IJ erred in finding that he made a false claim of citizenship. That claim is not properly presented here because it was not addressed by the court of appeals. The court of appeals ruled only that petitioner's claim was unreviewable; it did not consider any of the underlying substantive issues petitioner sought to raise. Pet. App. 4a. Review should be denied on that basis alone. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001).

In any event, both the Board and the court of appeals determined that petitioner waived that claim several years ago by failing to challenge the IJ's findings in his initial appeal. See Pet. App. 9a; *Lewis*, 262 Fed. Appx. at 545. Petitioner sought certiorari, and it was denied. See *Lewis*, 129 S. Ct. at 310. Petitioner cannot attempt to revive a challenge to the IJ's factual findings at this late date. And even if petitioner could raise and prevail on his argument that he did not falsely claim citizenship, the IJ already has determined that he would not warrant a favorable exercise of discretion, as would be required for the relief petitioner seeks. A.R. 496-499.

Finally, petitioner contends (Pet. 20-21) that the IJ violated his due process rights by not allowing him to put on certain evidence in support of a request for relief for which he was ineligible. That claim also was not addressed by the court in the decision below. It also was raised and rejected by the Board (Pet. App. 10a) and the court of appeals (*Lewis*, 262 Fed. Appx. at 545) at an earlier stage of this litigation, and certiorari was denied. The claim would fail on its merits in any event. As the

court of appeals explained, petitioner "cannot succeed with this due process claim because he fails to show the requisite prejudice resulting from the alleged error." *Ibid.* Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-913

In The Supreme Court of the United States

Elvis David Lewis
PETITIONER

v.

Eric H. Holder, Jr., Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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BRIEF REPLY

The BIA's decision to deny Petitioner Elvis Lewis' ("Mr. Lewis") motion to reopen *sua sponte* is an act of agency discretion delegated to the BIA by regulation under 8 CFR 1003.2(a), and under the this Court's recent decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010), a Circuit Court has the power to review matters delegated by regulation.

Id. at 831. (holding that the prohibition on judicial review applies to "statutory, but not to regulatory, specifications"). Mr. Lewis' due process rights were violated and the Respondent fails to address the underlying due process violations which initially and repeatedly have denied Mr. Lewis a full and fair opportunity to present his case, in conformity with the due process rights articulated under the Fifth Amendment. *Salgado-Diaz*, 395 F.3d 1158, 1165-66 (9th Cir. 2005); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 370 (9th Cir. 2003). Mr. Lewis' claim also presents colorable legal questions.

I. Judicial Review of Constitutionally Protected Rights Cannot be Circumscribed by Executive Regulation

Respondent's brief essentially argues that because the Fourth Circuit partially denied Mr. Lewis' motion based on 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1227(a)(2)(B)(i), the BIA's decision is unreviewable. Respondent's Brief ("Resp. Br.") at 10-13. A Circuit Court's decision to deny review must consider all alleged errors. Mr. Lewis' case presents important underlying constitutional questions which should have caused the BIA to remand the case at which time Mr. Lewis would have an opportunity to present evidence. Judicial review of administrative decisions has long been seen as the primary mechanism for ensuring fair and impartial agency decision-making. *Kucana v. Holder*, 130 S. Ct. 827 (2010) (noting the

importance of judicial review of motions to reopen); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993).

Here, Mr. Lewis was never afforded an opportunity to present evidence on material issues and his due process rights were violated when he was prevented from presenting evidence in his case. A finding of removability does not necessarily preclude review by this Court when the record demonstrates other important procedural errors. Specifically, the BIA and the Fourth Circuit upheld the Immigration Judge's determination that Mr. Lewis had made a false claim of citizenship based on an incomplete record and without affording Mr. Lewis an opportunity to testify completely, violating his right to due process. *See Salgado-Diaz v. Ashcroft*, 395 F.3d 1158 (9th Cir. 2005) (holding that due process requires a full and fair hearing including an opportunity to present evidence). It is these errors which should have been addressed below, and that robbed Mr. Lewis of his constitutionally protected due process rights.

Respondent argues that the Fourth Circuit was bound by its prior decision in *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009), *cert. denied by Mosere v. Holder*, 130 S. Ct. 137 (2009), claiming that this precedent prevents the Fourth Circuit from reviewing the BIA's decision. (Resp. Br. at 11). However, as this Court is aware, a prior decision by this Court is only binding insomuch as the decision remains persuasive and is on all fours

with the current case. *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'") (quoting *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940)). Because the *Mosere* decision was decided before this Court's recent decision in *Kucana*, this Court should re-evaluate the persuasiveness of that reasoning in light of this Court's most recent opinion.

In *Kucana* this Court took pains to highlight the importance of judicial review of procedural safeguards and to reiterate that the Attorney General should not be allowed "a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S. Ct. at 840. Respondent's argument attempts to circumscribe the power of the Circuit Courts to review executive decisions that implicate constitutionally protected procedural safeguards simply by refusing to provide a standard of review for *sua sponte* review. Resp. Br. at 11 (claiming that the issues presented are "unreviewable because it is committed to the Board's discretion by law").

As the *Kucana* Court's decision indicates, the judiciary ought not so easily cede reviewability of important procedural issues merely because the executive (and not Congress) classifies them as "discretionary." *Id.* Unlike *Mosere*, the instant case

involves important procedural safeguards of the type specifically identified in *Kucana*. *Id.* at 837 (noting that a reversal of the BIA's decision not to reopen "touches and concerns only the question whether the alien's claims have been accorded a reasonable hearing"). *Kucana* indicated that decisions which implicate the fundamental fairness of the underlying agency action are generally given more access to judicial review than agency determinations regarding substantive policy determinations. *Id.* at 837.

Here, this Court is presented with alleged errors in both the substantive and procedural elements of Mr. Lewis' case; however, Mr. Lewis' most basic grievance remains his incomplete and unconstitutional denial of a full and fair hearing on the issue of whether he falsely represented himself as a United States citizen. Because these errors go directly to the substance of whether Mr. Lewis was afforded a fair hearing, this case presents issues of the very type the *Kucana* Court considered ripe for judicial review. 130 S. Ct. at 837.

In sum, Respondent has argued that this Court is unable to review the BIA decision because a lack of agency standards make review impossible. (Resp. Br. at 13.) Respondent's argument, however, relies on unpersuasive authority from the Fourth Circuit that was decided without the benefit of this Court's decision in *Kucana*. Respondent's argument advocates a bright-line rule preventing any judicial review of

BIA decisions not to reopen a case *sua sponte*, regardless of the underlying errors. Such an inflexible and overly rigid rule would strip the Circuit Courts of the important oversight functions necessary to ensure aliens are given full and fair hearings complete with necessary procedural safeguards. Although this Court may not be eager to engage in wholesale review of all *sua sponte* BIA decisions, the Court can and should permit a threshold determination regarding the nature of the underlying grievance, and when, as in this case, the underlying errors implicate constitutional due process, allow limited review to ensure compliance with constitutionally required procedural due process. As this Court indicated in *Kucana*, important distinctions should be made between procedural and substantive issues when considering whether to allow judicial review

II. Mr. Lewis Raised Important Legal Questions that Merit Review

Respondent argues that Mr. Lewis does not raise a "colorable legal issue" since the "Board determined that petitioner was removable.. [and] [t]hose fact-based determinations do not raise questions of law." (Resp. Br. At 15). However, because the Board is not permitted to make findings of fact, and must instead rely on the record developed by the Immigration Judge, the Board's decision in this case is not a fact-based determination, but is a pure legal question. *Adbulai v. Ashcroft*, 239 F.3d 542, 549-50 (3d Cir.

2001)(The Board must make its decision based upon the record developed by the record developed by the Immigration Judge.) When the Board "determined" that Mr. Lewis had falsely claimed to be a United States Citizen under 8 U.S.C. § 1227(a)(3)(D), it was merely making a legal conclusion regarding the sufficiency of the evidence presented below. In this case, the only evidence relied upon by the Immigration Judge were a partial passport of unknown origin and an I-9 Employment Eligibility Verification Form ("Form I-9") where the box for "Citizen or National of the United States" was checked.

On April 3, 2009, the USCIS amended Form I-9. The predecessor Form I-9[1] asked applicants to check a box if they were a "Citizen or National of the United States." The updated Form I-9 removed this language and instead asks applicants to select between either "A *citizen* of the United States" or a "noncitizen *national* of the United States." (emphasis added).

Leading up to that decision, numerous Circuit Courts had found the language of this Form I-9 problematic, and noted that checking the box as a non-citizen alien did not constitute a false claim of citizenship under 8 U.S.C. § 1227(a)(3)(D). *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004); *Rodriguez*

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[1]This version of Form I-9 was the one at issue in Mr. Lewis' case below.

v. Mukasey, 519 F.3d 773 (8th Cir. 2008) Given the ambiguity present in the Form I-9 filled out by Mr. Lewis, it was improper to rely upon this Form I-9 in deciding whether Mr. Lewis made a false claim of citizenship under 8 U.S.C. § 1227(a)(3)(D).

Respondent argues that the Immigration Judge "reviewed the evidence and testimony and make specific findings that petitioner made a false claim of citizenship" (Resp. Br. at 15). Respondent contends that this finding by the Immigration Judge, coupled with Mr. Lewis' failure to initially contest the validity of the Immigration Judge's findings as to his claim of citizenship bars Mr. Lewis from relief. (Resp. Br. at 15-16). However, Respondent's position is not supported by the law since in cases such as these, the Department of Homeland Security has the burden of proving by "clear, unequivocal, and convincing evidence" that an alien admitted to the United States is deportable. *Woodby v. INS*, 385 U.S. 276, 286 (1966). In making that decision, the Immigration Judge, the Board, and the Fourth Circuit all committed reversible error by relying on the ambiguous Form I-9 filled out by Mr. Lewis.

Respondent argues that Mr. Lewis may not properly raise the Immigration Judge's finding that he made a false claim of citizenship because he did not expressly raise it in his initial appeal to the BIA. (Resp. Br. At 15). However, failing to raise an issue of constitutional concern in an initial immigration court proceeding does not strip the

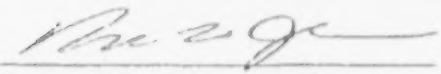
alien of redress by a reviewing court when that claim was subsequently addressed by a reviewing court. *United States v. Williams*, 504 U.S. 35 (1992)(finding that a petitioner does not necessarily waive a claim simply by not raising it in the initial appeal). Rather, this Court has only found a question of law unreachable when it was not raised or passed upon by the court below. *Id.* In this case, although Mr. Lewis did not present an argument regarding Section 1227(a)(3)(D) at the BIA, the Board did address this issue in its March 22, 2007 Decision. (*See* Pet. Br. at 9a-10a.). When the BIA issued its March 22, 2007 opinion discussing this issue, the BIA specifically noted that Mr. Lewis was ineligible for relief because of the Immigration Judge's finding that Mr. Lewis made a false claim of US Citizenship under 8 U.S.C. § 1227(a)(3)(D).

Because the Fourth Circuit denied relief based on jurisdictional issues, and endorsed the outdated logic of *Mosere*, this Court may properly consider the underlying issue of whether it was error to rely on the old and ambiguous Form I-9. The Fourth Circuit did not directly address this issue; however, the Section 1227(a)(3)(D) argument was raised by Mr. Lewis in his brief to the Fourth Circuit and is properly before this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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